Supreme Court, U.S.
FILED
APR 27 2000
CLERK

Nos. 99-1507 & 99-1530

In The

Supreme Court of the United States

LARRY DUNN, TOM DUCKWORTH, et al.,

and

JOSEPH S. NORMAN, II,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' COPELAND, BREEN, BALDWIN and PETACHENKO'S BRIEF IN OPPOSITION

LAW OFFICES OF STUART A. GOLDSTEIN
STUART A. GOLDSTEIN*
BLANCA SORDO
9350 South Dixie Highway
Tenth Floor
Miami, Florida 33156
(305) 670-1222

**Counsel of Record for Respondents Copeland, Breen, Baldwin & Petachenko*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Respondents do not agree with the Questions Presented in the Dunn Petitioners' Petition as they misstate the facts and issues decided by the Circuit Court. The record does not support the issues as presented by the Dunn Petitioners. Petitioner Norman likewise advances questions presented which are not supported by the record as they were never raised in the court below.

PARTIES TO THE PROCEEDINGS

The Copeland Respondents agree with the Petitioners' List of Parties and have no other parties to add.

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STATUTES AND RULES:

The Railway Labor Act, 45 U.S.C. Sections 151 et seq. 1

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CITATION OF THE OPINIONS BELOW

Petitioners correctly state that the opinion of the United States District Court for the Southern District of Florida is unreported. Petitioners further correctly cite the opinion of the Eleventh Circuit Court of Appeals as reported at 193 F.3d 1185.

JURISDICTION

The Copeland Respondents believe the issues raised by Petitioners do not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction as outlined in Rule 10 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The Copeland Respondents agree with the Dunn Petitioners' assertion that the Railway Labor Act, 45 U.S.C. Sections 151 et seq. is generally involved in this matter. However, the Copeland Respondents disagree with Petitioner Norman that this matter involves 29 U.S.C. Section 158(c) or Federal Rules of Civil Procedure 56.

I.

STATEMENT OF THE CASE

This Brief In Opposition is filed by Respondents Charles H. Copeland, Edward J. Breen, Lewis Baldwin

and Gregory Petachenko who will be referred to collectively as "the Copeland Respondents." The Dunn Petitioners' Statement Of The Case misstates several important aspects of the relevant history of this matter.[1] Respondents offer a more accurate account of the background of this matter and the facts as determined by the Eleventh Circuit Court of Appeals.

A. Factual Background

This case arises out of the International Association of Machinists' (hereinafter IAM) lawful strike at Eastern Airlines from 1989 through 1991 which arose out of an impasse from unsuccessful collective bargaining agreement negotiations. Although Eastern's pilots were also involved in collective bargaining agreement negotiations, in early March 1989, after the IAM strike was underway, the Air Line Pilots Association (hereinafter ALPA) conducted a lawful sympathy strike in support of the IAM's strike. Pursuant to ALPA's Constitution and By-Laws, the Board of Directors established certain ALPA policies which are maintained in ALPA's Administrative Manual. [Maj. Op. 19][2]. These policies, which are binding on all ALPA members, including all Petitioners who were then ALPA members, provide that "the decision to honor or

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[1] Case No. 99-1507 was filed by Larry Dunn, Tom Duckworth, et al. Those Petitioners will be referred to herein collectively as "the Dunn Petitioners."

[2] The opinion of the Eleventh Circuit was included in the Dunn Petitioners' Petition as Appendix A. The majority opinion shall be cited herein as [Maj. Op.] followed by the page number in the Dunn Petitioners' Appendix A.

not honor picket lines of other crafts shall be left to the discretion of the President and the MEC[3,4] of the carrier involved." [Maj. Op. 20]. That is, while a membership vote is required prior to conducting primary strikes, no vote of ALPA members is required for the purpose of authorizing a sympathy strike. [Maj. Op. 21-22]. This procedure has been consistently followed by ALPA and its members during several previous sympathy strikes. [Maj. Op. 20-21]. Over ninety percent of Eastern pilots initially joined the sympathy strike and refused to cross IAM picket lines. [Maj. Op. 3].

In August 1989, ALPA conducted several meetings at which the continuation of the strike was discussed. One such meeting, held in Miami, Florida, on August 6, 1989, was broadcast to other cities. Although the issue of continuing the strike was debated at that meeting, it is undisputed that the Miami-based pilots voted overwhelmingly to continue the strike. [Maj. Op. 4-5]. On August 11, 1989, ALPA advised all pilots of the decision to continue the sympathy strike. [Maj. Op. 5].

ALPA's sympathy strike officially ended on November 22, 1989. It is undisputed, however, that at various times during ALPA's sympathy strike, all Petitioners crossed ALPA's picket lines by returning to work as

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[3] Within each airline, ALPA operates though a Master Executive Council which is a board of pilot representatives, elected by the pilots, and which makes union policy decisions for that airline's pilots. [Maj. Op. 2].

[4] Respondent Charles H. Copeland was a member of the ALPA/Eastern Air Lines Master Executive Council and became its Chairman in September 1989.

pilots, or offering to do so, and in doing so took the jobs of striking Eastern pilots. Petitioners assisted Eastern in breaking the IAM and ALPA strikes and allowed Eastern to continue its operations despite the strikes thus thwarting the strikers' efforts. Petitioners' names were included on a list entitled "The Scabs of Eastern of the Strike of '89." The listing of Petitioners' names on that list formed the basis of their libel claims in this action.

B. Procedural Background

This matter originated on October 9, 1991, when Petitioners filed their first complaint in the Circuit Court in and for Dade County, Florida, alleging, *inter alia*, defamation.[5] Respondents/Defendants were successful in removing the lawsuit to the District Court. After several amendments and motions to dismiss, Petitioners filed their third and final amended complaint. Upon the completion of all discovery, Respondents filed their motions for summary judgment. The District Court, concluding there was no evidence that the description of Petitioners as "scabs" was either false or published with actual malice, granted summary judgment in favor of all Respondents.

Petitioners appealed to the Eleventh Circuit Court of Appeals where, in a 2-1 decision, it affirmed the District Court decision and found that labeling Petitioners as "scabs" was a truthful allegation and that the scab list

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[5] Other claims were either dismissed or are not before this Court.

was not published with actual malice. [Maj. Op. 2]. Further, the Eleventh Circuit concluded ALPA was not required to conduct a vote prior to conducting a sympathy strike and that ALPA did not end the work stoppage on August 6, 1989. [Maj. Op. 20, 29].

II.

ARGUMENT

REASONS FOR DENYING THE WRITS

The Petitions For A Writ Of Certiorari should be denied since the issues raised therein are not representative of the matters resolved by the courts below. The issues presented by Petitioners were neither decided as the Petitions represent nor do they establish the far reaching precedent Petitioners urge upon this Court. Petitioners ask whether a union may label some members as trade union "scabs" for either refusing to honor the picket lines of what they contend was an illegal strike or for refusing to work after allegedly being ordered to do so by their local union president. [Dunn Petition 11, 28]. Petitioner Norman[6] contends the publishing of the "scab" list was untimely, that the District Court did not review relevant evidence, that as a trainee he did not "work" for Eastern Airlines and that the publishing of the "scab" list was a "threat of reprisal," in violation of 29 U.S.C. Sec. 158(c). [Norman Petition 5, 6, 8, 9].

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[6] Joseph Norman, II, filed a separate Petition, pro se. He will be referred to herein as "Petitioner Norman." As noted above, all other Petitioners are referred to as "the Dunn Petitioners." The term "Petitioners" incorporates both.

The Dunn Petitioners argue the Eleventh Circuit's decision establishes that a union has unfettered discretion to illegally call a strike and then label members who do not honor that strike "scabs." [Dunn Petition, 12, 17, 18]. As both the District Court and the Eleventh Circuit have determined based on the record, the Dunn Petitioners are incorrect in their assertion that ALPA's 1989 sympathy strike was illegal, thus, this argument has no merit. [Maj. Op. 18]. Further, the Dunn Petitioners contend that they are not "scabs" since they claim they were told to return to work on August 6, 1989, by their union president. Again, both the District Court and the Eleventh Circuit have determined that ALPA did not officially end the strike until November 22, 1989 and not after the August 6, 1989, meeting as the Dunn Petitioners argue. [Maj. Op. 14, 15, 17, 28]. Thus, returning to work prior to November 22, 1989, in ALPA's view, made Petitioners "scabs." Petitioner Norman's allegations are likewise without merit since they fail to address the central issue in this matter, whether Respondents used the term "scab" knowing it was false and with actual malice.

Petitioners do not call upon this Honorable Court to resolve a compelling and far-reaching matter of federal law, but rather to reassess the factual determinations made by the courts below and to reevaluate the record evidence. The Eleventh Circuit was correct in all its factual determinations and correctly applied the relevant precedent established by this Court. Since Petitioners fail to raise any compelling issue which would merit exercising this Court's discretion in granting a writ of *certiorari*, the Petitions should be denied.

A. The Decision Of The Eleventh Circuit Court Of Appeals Was Factually And Legally Correct

The Eleventh Circuit's decision does not hold what the Dunn Petitioners represent. They argue the Eleventh Circuit's decision holds a union can call an illegal strike and then label members as "scabs" for not honoring the strike. [Dunn Petition 16]. This argument is incorrect in several aspects. First, the Eleventh Circuit determined the strike was not illegal. [Maj. Op. 18]. Second, the Eleventh Circuit determined that Petitioners, by not honoring the legal sympathy strike, were, in fact, scabs. [Maj. Op. 14, 15].

i. Factual Findings

The Eleventh Circuit reviewed the record *de novo*, as it is required to do, and determined based upon all the evidence, that the Petitioners were, in fact, scabs, and that the sympathy strike was legal. [Maj. Op. 16, 18]. The Eleventh Circuit based its decision on the fact that ALPA's governing documents give discretion in the calling of the sympathy strike to the MEC and ALPA's president. [Maj. Op. 20] The Eleventh Circuit further found that several sympathy strikes have been called by ALPA in the past without the need for a membership vote. [Maj. Op. 21]. Indeed, no ALPA sympathy strike has ever been preceded by a membership vote. [Maj. Op. 20]. The Eleventh Circuit found that the pilots who returned to work after the April 6, 1989, meeting were considered "scabs" by Respondents since the work stoppage continued after that meeting and until November 22, 1989. Thus, there

was no evidence that including those Petitioners' names on the scab list constituted actual malice.

The Dunn Petitioners are essentially asking this Court to review the record below and reassess these factual determinations which are dispositive of this matter. As discussed below, the Eleventh Circuit applied correct legal precedent, as established by this Court, in reaching these factual conclusions. Thus, there is no basis for this Court to exercise its discretion in granting the Petitions merely to reevaluate the evidence and reassess the factual conclusions correctly established by the courts below.

ii. Legal Conclusions

The Eleventh Circuit's legal analysis was correct. The court applied the precedent established by this Court in *Linn v. United Plant Guard Workers Of America*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), in determining that "federal labor law partially preempts state libel law because national labor policy favors free speech, open communication, and robust debate in labor disputes," and in order to maintain an action for libel plaintiffs must show actual malice. [Maj. Op. 9]. The court further concluded that prior to reaching the "actual malice" analysis, there must be a "false statement of fact." [Maj. Op. 10]. The court applied the "reasonable reader" approach as set forth by this Court in *Letter Carriers* and concluded the term "scab" must be read from the perspective of a reasonable reader. [Maj. Op. 13].

a. Petitioners Were "Scabs"

In applying the reasonable reader approach and examining the term "scab" by its commonly understood definition of "one who refuses to strike or returns to work before a strike has ended" [Maj Op. 14], the Eleventh Circuit determined that labeling the Petitioners as "scabs" was not a false statement. That is, because calling Petitioners "scabs" was an allegation that these pilots refused to honor a work stoppage, and because Petitioners admit they crossed the 1989 ALPA picket lines during the work stoppage, "ALPA's listing them as 'scabs' was factually true . . . " [Maj Op. 14].

b. The ALPA Sympathy Strike Was Legal

The Dunn Petitioners argue the strike was illegally called thus calling them "scabs" was false because they did not, in fact, cross picket lines. [Dunn Petition 25]. However, as detailed above, the Eleventh Circuit concluded the truthfulness of calling Petitioners "scabs" does not turn on the "formalistic, legal analysis of the validity of the strike, but on a reasonable reader's perception of this work stoppage as a 'strike.' " [Maj. Op. 16]. Further, the Eleventh Circuit concluded that the sympathy strike was, in fact, legal. ALPA's Administrative Manual provides in its "Strike Policy" that "[T]he decision to honor or not honor picket lines of other crafts shall be left to the discretion of the President and the MEC of the carrier involved." Thus, no membership vote is necessary, contrary to the Dunn Petitioners' argument. The Eleventh Circuit further determined that ALPA has applied this policy consistently for the past thirty years and declared

sympathy strikes without the need of a membership vote. [Maj. Op. 20].

c. No Actual Malice

The Eleventh Circuit concluded not only that calling Petitioners "scabs" was not false and that the strike was legal, but it also concluded that Petitioners were required to show "actual malice" in order to maintain an action for defamation in this labor dispute. The Eleventh Circuit correctly applied precedent as established by this Court in *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), in finding that Petitioners must demonstrate by clear and convincing evidence that "the defendant realized that his statement was false or that he subjectively entertained serious doubt as to [its] truth." [Maj. Op. 25 citing *Bose*]. The court determined there was no evidence on the record to show Respondents acted with actual malice in publishing the "scab" list as there was no evidence that any Respondent entertained any doubt that all Petitioners were, in fact, "scabs." [Maj. Op. 26].

B. The Decision Does Not Merit This Court's Attention

The Eleventh Circuit's decision is not far-reaching, as Petitioners suggest. There is no indication that the Eleventh Circuit's decision stands for the proposition that unions may call strikes and then libel members for not honoring them. As detailed above, the Eleventh Circuit

concluded ALPA's 1989 sympathy strike was legal. However, assuming *arguendo* that this factual conclusion is incorrect, the Eleventh Circuit's decision only potentially misinterprets ALPA's administrative procedures. Thus, in no way does the Eleventh Circuit suggest that all unions may follow this procedure for calling sympathy strikes. At most, the Eleventh Circuit's decision that a membership vote is not required prior to calling a sympathy strike is merely an interpretation of ALPA's policies. Thus, the decision only reaches a conclusion as to ALPA, and does not detrimentally affect labor law as Petitioners represent. [Dunn Petition, 17].

Further, Petitioners do not present this Court with a compelling reason to exercise its discretion in granting *certiorari* review. This case does not present, nor do Petitioners allege it presents, a conflict among circuits for resolution by this Court. This Court has noted that "A principal purpose for which we use our certiorari jurisdiction, . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 500 U.S. 344 (1991).

The Dunn Petitioners obviously disagree with the District Court's and the Eleventh Circuit's factual findings and merely ask this Court to review the record and overturn those factual determinations. The Petition is not based on any errors by the Eleventh Circuit, rather Petitioners merely re-argue the merits of their case to this Court. As noted above, those arguments and factual allegations were considered and rejected by both courts below. At most, the Eleventh Circuit reached improper factual conclusions. As mandated by Rule 10 of the Rules

of the Supreme Court, this Court rarely grants *certiorari* where the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As discussed above, the Eleventh Circuit applied the correct law and, we believe, reached the proper factual conclusions.

The Petition presents no compelling reason, no conflict between the circuits and no departure from the accepted course of proceedings. The Eleventh Circuit's ruling in no way conflicts with any decisions of this Court. Indeed, Petitioners do not so allege. The Eleventh Circuit was correct in its factual findings and application of the law.

C. Petitioner Norman Does Not Raise Any Compelling Or Meritorious Issues For Review

Petitioner Norman advances several arguments in his Petition. These arguments are likewise meritless as they do not raise any compelling reasons which would warrant this Court's exercise of discretion in granting *certiorari*.

i. Arguments Were Not Raised To The Eleventh Circuit

Petitioner Norman advances arguments in his Petition which were not presented to the Eleventh Circuit. First, Petitioner Norman contends that the publication of the "scab" list a year after the end of the sympathy strike is no longer protected speech. This is a new argument which was never raised by Petitioner Norman before the

appellate court below. Second, Petitioner Norman for the first time advances an argument that 29 U.S.C. Section 158(c) forbids the publication of a scab list a year after the labor dispute since this would be a "threat of reprisal or force or promise of benefit," in violation of that section. Another argument not raised before the Eleventh Circuit.[7] This Court has consistently held that it will not consider arguments which were "neither raised nor considered below." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Ind.*, 527 U.S. 308 (1999); see also *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999) ("Supreme Court would not decide in the first instance issues not decided below"); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) ("Where issues are neither raised before nor considered by Court of Appeals, Supreme Court will not ordinarily consider them"). Petitioner Norman is now barred from arguing these points since they were not presented to the Eleventh Circuit, Respondents were never given an opportunity to argue their validity and the Eleventh Circuit never assessed their merits.

ii. The District Court Did Consider All Relevant Evidence

Petitioner Norman contends the District Court erred in not reviewing his affidavit prior to granting

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[7] Petitioner Norman did cite 29 U.S.C. Section 158(c) in his appellate brief for the proposition that "blacklisting" is "proscribed" by that section. However, the argument advanced by Petitioner Norman before this Court was not made to the Eleventh Circuit.

Respondents' motions for summary judgment. Petitioner Norman bases this argument on a statement made by the District Judge during oral argument that he did not have Norman's affidavit before him. [Norman Petition 6]. However, the ruling on the motions was entered several months after oral argument and there is no basis to conclude the District Court did not consider Norman's affidavit prior to ruling. Further, as argued by Respondents before the Eleventh Circuit, Norman's affidavit should have been stricken from the record in any event since its submission was late by more than seven months.

iii. Norman Worked For Eastern And Was Thus A "Scab"

Petitioner Norman contends that since he was merely in training, he was not "working" for Eastern and was thus not a "scab." [Norman Petition 8]. However, as correctly stated by the Eleventh Circuit, a "scab" is someone who works or offers to work during a work stoppage. The Eleventh Circuit concluded that Norman was hired by Eastern as a DC-9 Captain during the sympathy strike and received compensation during training. [Maj. Op. 31]. Thus, participating in the training was "work." Since Norman worked or offered to work for Eastern during the sympathy strike, he along with all other Petitioners, was a scab.

III

CONCLUSION

For the foregoing reasons, the Copeland Respondents respectfully request this Honorable Court deny the Petitions For A Writ Of Certiorari.

Respectfully submitted,

LAW OFFICES OF STUART A. GOLDSTEIN
STUART A. GOLDSTEIN*
BLANCA SORDO
9350 South Dixie Highway
Tenth Floor
Miami, Florida 33156
(305) 670-1222

Counsel of Record for Respondents Copeland, Breen, Baldwin & Petachenko